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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 194.

HENRY CHARNOCK, PLAINTIFF IN ERROR,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY.

BRIEF FOR PLAINTIFF IN ERROR.

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Statement of the Case.

This is a suit for $2,440.32, with interest, the value of 52 bales of cotton, delivered to the defendant by plaintiff at Lunenburg plantation, parish of Rapides, Louisiana, for carriage from that point to New Orleans, Louisiana.

Suit was first instituted in the civil district court for the parish of Orleans, State of Louisiana, but was subsequently removed to the circuit court of the United States for the eastern district of Louisiana, on the application of the defendant, on the ground that it was a corporation created by and organized under certain acts of Congress (R., 5–6).

In the circuit court the defendant pleaded, first, the general issue, and under the reserve of this plea it set up that the cotton was received by it, to be transported and deliv-

ered under certain bills of lading; that the cotton was destroyed by fire while in possession of the defendant; all other allegations of the petition were denied.

The answer further set up that the bills of lading, under which the cotton was shipped, stipulated that the defendant should not be liable for any loss or damage to it by fire, and this exemption was specially pleaded and set up; there was a further denial that plaintiff had any interest in the suit, for the reason that he had already assigned or parted with the interest in favor of an insurance company or insurance companies, unknown to defendant (R., 9–10).

On the trial of the cause it was proven that no insurance had been procured on the cotton, and hence there were no policies to assign (R., 29).

Subsequently, on the trial of the cause, there was a verdict and judgment for the defendant.

At the trial bills of exception were taken by the plaintiff, first, to the refusal by the court, upon the whole of the testimony and evidence, both for plaintiff and defendant, to instruct the jury to find a verdict for the plaintiff; second, to the action of the court in directing the jury to find a verdict for the defendant upon the whole of the testimony and evidence, both for plaintiff and defendant, and, third, to the refusal of the court, upon the whole of the testimony and evidence of both plaintiff and defendant, to submit to the jury and allow it to pass upon the question whether or not the loss or destruction of the cotton by fire was due to or caused by defendant's negligence.

All as is shown by the bills of exception Nos. 1, 2, and 3, found in the Record, at pages 15–34 and 46.

The whole of the testimony and evidence introduced and filed by both plaintiff and defendant was annexed to and made part of the bill of exception No. 1. This evidence included the bill of lading in question, issued by defendant to plaintiff, the third paragraph of which contained the following stipulation, to wit:

"That neither the Texas & Pacific Railway Co., nor any connecting carrier handling said cotton, shall be liable for damage to, or destruction by fire," * * * (R., 18).

The case was carried by writ of error to the circuit court of appeals of the United States, fifth circuit, by which the judgment of the circuit court was affirmed. The judgment of the former court, by writ of error, is brought here for review, jurisdiction being found upon the fact that The Texas and Pacific Railway Co., defendant, is a corporation created by certain acts of Congress, and hence this is a case arising under the laws of the United States.

ASSIGNMENTS OF ERROR.

The following are the assignments of error in this case:

1. That the circuit court of appeals erred in affirming, upon the whole of the evidence introduced by plaintiff and defendant, the action of the circuit court in directing a verdict for the defendant.

2. That it also erred in directing a verdict for defendant and withdrawing consideration of the evidence from the jury; also in directing the jury to find a verdict against plaintiff.

3. That it also erred in affirming the action of the circuit court in refusing to allow plaintiff to submit to and argue before the jury the question of the neglegence of the defendant, by reason of which plaintiff claimed the destruction by fire of his cotton.

4. That the circuit court of appeals was likewise in error in holding that the evidence found in the record did not show negligence on the part of the carrier; that the court

should have held the contrary, and have reversed the judgment of the circuit court brought before it for review on the ground that the alleged negligence of the defendant was amply sustained by the evidence.

5. That the circuit court of appeals should have held that the circuit court committed error upon its refusal, upon the whole of the evidence in the case, to direct a verdict for the plaintiff.

6. That it was likewise in error in affirming the refusal of the circuit court to direct the jury, upon the whole of the evidence in the case, to find a verdict for the plaintiff.

7. That the circuit court of appeals erred in affirming the action of the circuit court in refusing to allow the submission of the case to the jury on the question whether or not, upon the whole of the evidence before it, the destruction of plaintiff's cotton complained of was due to the negligence of the defendant.

8. That upon the whole of the evidence offered in the case and adduced before the jury it was clearly shown that the destruction of plaintiff's cotton was caused by the negligence of the defendant, from the liability of which the law does not permit it to stipulate that it should be exempt.

9. That the circuit court of appeals also erred in affirming the action of the circuit court in holding that the loss of said cotton was not due to the negligence of defendant.

SYLLABUS.

In order to be binding upon the shipper a contract limiting the common-law liability of a carrier must be upheld by a valid consideration.

Hutchinson on Carriers, sec. 278.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. Cases, 273.

In Louisiana, where the consideration is denied, and the evidence leaves its existence or reality in doubt, the burden is on the carrier to prove the consideration.

Mossop *vs.* His Creditors, 41 La. Ann. Rep., 297.

The validity or effect of the exemption is determined by the law of Louisiana.

Liverpool, etc., Co. *vs.* Phœnix, etc., Co., 129 U. S., 397–453.

Where proof of one of the facts in issue is peculiarly within the knowledge of one of the parties, the burden of proof is shifted to the party who has special knowledge as to the controverted fact, and he must establish it by evidence.

King *vs.* Adkins, 33 La. Ann. Rep., 1057–1065.

School Board *vs.* Trimble, 1073–1079.

Where a bill of lading, or contract, limiting the liability of the carrier, contains no statement of the rate paid, the whole limitation is void.

Kellerman *vs.* Kan. City, etc., R. Co., 68 Mo. App., 255–275.

Contracts limiting the common-law liability of carriers are not favored by the law, and they are not binding on the shipper unless fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.
Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482.

In order to be valid, such contract must be the choice of the shipper, and not of the carrier; the shipper must be allowed an option or opportunity to select under which, the common-law or limited liability, he will ship his goods; if such free choice or option is not allowed him, the contract is not reasonable, and therefore is void; both rates, that for transportation under the common-law liability and that under the limited liability, must be free to the shipper in order that he may have real liberty of choice in making the selection between the two; otherwise, the contract limiting the liability is not fair or reasonable, and therefore is void.

Atchinson, etc., Co. *vs.* Dill, 56 Am. & Eng. R. Cases, 376.
Dovignac *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.
Lewis *vs.* Great Western R. Co., 3 Q. B. Div., 195; 47 L. J., Q. B. Div., 131.
Car *vs.* Lancashire, etc., Co., 21 L. J., Exch. 261; 7 Exch., 707.
L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372–375.

A carrier is not permitted to so limit its liability as to exempt it from the consequences of its own negligence.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.
The Tanbark, 23 Fed. Cases, 680, case No. 13742.

Where there is a clause limiting the liability of a carrier it bears the burden of proof to show not only that the cause

of the loss was within the exemption, but also that it was not due to its negligence or that of its servants.

South, etc., Co. *vs.* Henlin, 56 Ala., 606 (23 Am. Dec., 598).

Inman *vs.* South Carolina R. Co., 129 U. S., 128–139.

Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550–555.

Dillard *vs.* L. & N. R. Co., 2 Lea (Tenn.), 288.

Steele *vs.* Townsend, 37 Ala., 247.

Adams Exp. Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

In Louisiana, where the contract exempts the carrier from any loss by fire, he carries the burden of proving not only the exemption, but also that the loss was not due to the carrier's negligence, or omission of duty, in any manner causing or contributing thereto.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 397.

Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

This rule has been affirmed by decisions of Federal courts.

New Jersey, etc., Co. *vs.* Merchants' Bank, 6 H., 383.

Seiller *vs.* Pac. Co., 21 Fed. Cases, 1042, case No. 12644.

Ormsby *vs.* Union Pac. Co., 4 Fed. Rep., 706–712.

The exemption from loss or damage by fire is not effective unless the fire be the proximate cause of the loss or damage.

Condict *vs.* Grand Trunk R. Co., 54 N. Y., 500–504–505.

Proximate cause of the loss here was not the fire, but defendant's negligence, which preceded it and without which the fire would not have occurred.

The delivery of goods for shipment at a place where the carrier has consented to receive them for transportation is a complete delivery to the carrier, and when this is done its liability for the goods is that of a common carrier.

St. Louis, etc., Co. *vs.* Murphy, 60 Ark., 337 (30 S. W., 419).

Dixon *vs.* Georgia, etc., Co., 110 Ga., 173 (35 S. E., 369).

I. C. R. Co. *vs.* Smiser, 38 Ill., 354.

Greenwood *vs.* Cooper, 10 La. Ann. Rep., 796.

Barrett *vs.* Salter, 10 Rob. (La. Rep.), 424.

Fitchburg, etc., Co. *vs.* Hanna, 6 Gray (Mass.), 539.

A special contract exempting the carrier from liability in specified instances is to be used by it against any claim of liability as to which it was designed to furnish protection.

So. Pac. R. Co. *vs.* Arnette, 111 Fed. Rep., 849–852.

Where goods are delivered for shipment at a place designated by the carrier, and before being ladened, and while in such place, they are stolen or destroyed, the carrier is guilty of negligence, if it makes no provisions against such theft or destruction, and is liable to the shipper for the value of the goods.

Hutchinson on Carriers, sec. 89.

Fisher *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), 120.

Barrett *vs.* Salter, 10 Rob. (La. Rep.), 434.

Roth *vs.* Harkson, 18 La. Ann. Rep., 705.

Maxwell & Putnam *vs.* So. Pac. R. Co., 48 La. Ann. Rep., 399.

If the carrier negligently leaves goods in a place of danger, he cannot by stipulation exempt himself from liability for loss by fire.

McFadden *vs.* Railway Co., 92 Mo., 343.

ARGUMENT.

Upon the whole of the testimony and evidence heard and adduced on the trial of this cause plaintiff was entitled to a verdict in his favor.

The testimony shows (R., 21–28) that the cotton was brought by a gang of laborers employed on the Lunenburg plantation and working under the superintendent of the place to Meeker's Switch, which was on the plantation; that under plantation superintendence, the cotton was loaded into two box cars of the defendant, which it had brought there for the purpose of receiving the cotton; that after the latter was stored in the cars the doors of the latter were closed and locked by the superintendent of the plantation; that thereupon he proceeded to Lecompte, the nearest station of the defendant to Meeker's Switch, at which it maintained neither station nor agent, and there obtained a bill of lading for the transportation of the cotton to New Orleans, the bill of lading being the same described in the petition; that the loading of the cotton was completed at about 2.30 o'clock in the afternoon, and the bill of lading delivered to the plantation superintendent at Lecompte by the agent of defendant at about 5.30 o'clock the same afternoon.

About 10 o'clock on the night following the cars containing the cotton were discovered to be on fire. There was no agent or other representative of the defendant present at the place at the time of the fire. Both the cars and the cotton were unguarded and unwatched, being left on the track in an open field. There was no water or other appliances to extinguish the fire or to save the cotton or any portion of it.

R., 21–28.

From the time the cotton was loaded on the cars of defendant, which had been sent by it for the express purpose,

of receiving the cotton for transportation, or, in any event, from the moment defendant issued its bill of lading for the cotton, about 5 o'clock on the day on which the cotton was loaded, the latter was in the possession of the defendant as a common carrier, for the safety of which defendant was from that moment responsible as such carrier.

The defendant having thus voluntarily assumed, as regards the cotton, the responsibility of a carrier, it was required to take such measures as might be necessary to safeguard and protect the property from loss or damage, and the failure to take such precautions was negligence on the part of the defendant.

The assignments which charge error in the refusal to direct a verdict for the plaintiff, in instructing the jury to find a verdict for the defendant, and in refusing to allow the case to go to the jury on the question of defendant's negligence, may be conveniently argued together.

Primarily it was the duty of the defendant to transport plaintiff's cotton, under its common-law liability, as a carrier, which is practically that of an insurer, and, if the plaintiff so required, this the defendant would have been obliged to do. It was the right of the plaintiff to exact this or to have made his election to ship under the limitation of defendant's common-law liability after he had been given an option to choose between the two.

In support of this proposition, however, argument at greater length and authorities will be made and cited hereafter.

In his petition plaintiff set out the exemption clause of the bill of lading, but averred that he was not bound by it, and that the same was null and void, for the reason that he received no consideration for the granting of the exemption, and that the rate of freight was the only one which the defendant could give, and that the fire which destroyed the cotton was due to the negligence of the defendant, its servants or employees.

It has been decided that in order to support a stipulation of exemption of a common carrier from any liability for the loss of goods destroyed by fire there must have been some consideration, other than the mere contractual relation of the parties, moving from the carrier to the shipper, and contracts of exemption, like all other contracts, required a consideration to support them.

Wehman *vs.* Minneapolis, etc., Co., 61 Am. & Eng. R. R. Cases, 273.

The clause of a bill of lading by which a carrier is exempt from loss due to specific causes, to be valid, must be upheld by a consideration.

If a carrier seeks to evade liability by reason of a special contract, it must be made to appear that the carrier had a higher rate for contracts of carriage under its common-law liability than for the same under its limited liability.

The validity or effect of the exemption is to be construed by the law of Louisiana.

Liverpool, etc., Co. *vs.* Phœnix Ins. Co., 129 U. S., 397–453.

Under the law of Louisiana, while the denial of a consideration of a contract does not of itself require the party relying on the contract to prove the consideration, yet, when the evidence leaves the existence or reality of the consideration in doubt, the burden is on the obligee to sustain it by proof.

Mossop *vs.* His Creditors, 41 La. Ann. Rep., 297.

So far as concerned the plaintiff here, the evidence shows that he received from the defendant, without objection on his part, a bill of lading containing an exemption from the carrier of any liability from loss by fire. The plaintiff received or was paid nothing as a consideration for this agreement. If there was such consideration it was a fact pecu-

liarly, if not entirely, within the knowledge of the defendant, and to which it had offered no evidence.

In Louisiana, under the circumstances detailed above, where a party fails to furnish evidence which is clearly within his power, all presumptions of law are against him.

King *vs.* Atkins, 33 La. Ann. Rep., 1057–1065.

Under these circumstances the burden of proof is shifted to the party who knows the fact inquired about and can establish it by evidence.

King *vs.* Atkins, 33 La. Ann. Rep., 1065.

School Board *vs.* Trimble, 33 La. Ann. Rep., 1073–1079.

It has also been decided that where the bill of lading or contract containing the limitation of liability is blank or contains no statement as to the rate paid that the whole limitation is void.

Kellerman *vs.* Kan. City, etc., Co., 68 Mo. App., 255–275.

The bill of lading in this case contains no statement at all as to the rate of freight charged. The blanks left for this purpose are not filled out, so that the bill of lading itself furnishes no information at all as to the rate which was charged for the transportation. The recitals of the bill of lading in this regard are the following, to wit:

"Other rate per 100 lbs..... $ "
"Total freight..... $ "
"Advance charges..... $ "
R., 18.

It would therefore seem that the charges for carriage did not appear on the bill of lading, and hence the stipulation of non-liability was void.

Contracts limiting the common-law liability of carriers are not favored by the law, and in order for such a contract

to be binding on a shipper it must be fairly made and freely entered into by him.

Adams Express Co. *vs.* Nock, 2 Duval (Ky.), 562–565.
Hance *vs.* Wabash, etc., R. Co., 56 Mo. App., 476–482.

The carrier would be obliged to receive plaintiff's cotton, under its common-law liability, if the shipper insisted upon it.

Wallace *vs.* Matthews, 99 Am. & Eng. R. R. Cases, 473.

A contract of carriage containing a clause limiting the liability of the carrier, to be valid, must be the choice of the shipper, and not of the carrier; it is necessary that the shipper should have been allowed an opportunity or option to select under which, the common-law liability or the limited liability of the carrier, he would ship his goods; if such choice or option is not allowed him, the contract is not fair nor reasonable, and is, therefore, void; even in regard to the consideration, it must appear that both rates of transportation, that of the common-law liability and that under the limited liability, were offered the shipper and were reasonable, and that he had a genuine freedom of choice in making his selection as between the two.

Atchison, etc., Co. *vs.* Dill, 55 Am. & Eng. R. R. Cases, 376.
Duvenick *vs.* Mo. Pac. R. Co., 57 Mo. App., 550.

A carrier cannot limit its liability at all unless the shipper has been given an actual freedom of choice between the different kinds of contract under which the company will carry the goods, and this even where the shipper does not demand different terms.

Little Rock, etc., Co. *vs.* Cravens, 55 Am. & Eng. R. Cases, 650.

It was the duty of the defendant, within whose knowledge the facts lay exclusively to make it clear, that it did not make the same charge for carrying under its common-law liability as it made for transportation under its limited liability.

Michigan, etc., Co. *vs.* Haile, 6 Mich., 257–258.
L. & N. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. Cases, 372.

It is the rule in Louisiana that where a carrier seeks to avail itself of a clause in a bill of lading exempting it from liability for fire, and this exemption is not disputed in the case stated, the defendant carries the burden of proof that the loss was not due to the company's negligence, or to any omission of duty which in any manner caused or contributed to the loss.

Maxwell & Putnam *vs.* Railway Co., 48 La. Ann. Rep., 385–397–398.

Carriers are liable for the loss or damage for things intrusted to their care, unless they can prove that such loss or damage is occasioned by accidental or uncontrollable causes.

R. C. C. of Louisiana, 2754.

Also, carriers are subject, in respect to the safe keeping and preservation of the things intrusted to them, to the same obligations and duties as are tavern-keepers, in the title of the Code of "Deposit and sequestration"

R. C. C. Louisiana, 2751.

And turning to this title we find that an innkeeper is responsible for any of the effects which are stolen either by its servants or agents, or by strangers going or coming into the inn.

R. C. C. Louisiana, —.

The depositary is bound to use the same diligence in preserving the deposit that he uses in preserving his own property.

R. C. C. Louisiana, 2937.

And this latter provision is to be rigorously enforced where it has been agreed that the depositary shall have a reward for preserving the property.

R. C. C. Louisiana, 2938.

Where the property is lost or destroyed, the liability of the carrier must be governed by the provisions of R. C. C., 2967, which makes it liable for the effects which are stolen by strangers, and it can be said in the present case that the defendant, who made a charge not only for carrying, but also for the preserving the cotton while in its cars on its own tracks awaiting transportation, should have used the same care in preserving its own property. Where the cotton was loaded upon and locked in its own cars provided for this purpose, the cotton was left practically abandoned as to all protection in an open field in the night-time.

The burden of proving the reasonableness and fairness of the stipulation limiting the company's liability was upon the carrier itself, and it was unreasonable save when a fair and genuine option has been given the shipper to choose the kind of contract or the rates of freight under which he should ship.

Lewis *vs.* Great Western R. R. Co., 3 Q. B. Div., 195; 47 L. J., Q. B. Div., 131.

Atchison, etc., Ry. Co. *vs.* Dill, 55 Am. & Eng. R. R. Cases, 376.

A carrier cannot force upon the consignor a contract limiting the carrier's liability. The consignor may refuse to accept such a contract and insist upon the company taking his goods subject to the general liability of common

carriers, and this implies that he must have an option or chance of making his selection before or at the time of their refusal or allowance.

Carr *vs.* Lancashire, etc., Co., 21 L. J. Exch., 261; 7 Exch., 707.

The defendant offering its service to the public as a common carrier, and enjoying advantages and franchises as such, must be ready to do the business of a common carrier, with the measure of responsibility imposed by the common law; but it may, at the same time, offer to do the same business under a limited liability, the limitation being fair and reasonable and resting upon a full consideration. An offer or readiness to transport the goods of its customer with one or the other degree of responsibility, it has been held, is as little as can be required of any common carrier; less than this does not present a *bona fide*, reasonable alternative.

L. & N. R. R. Co. *vs.* Gilbert, 42 Am. & Eng. R. R. Cases, 372, 375.

It is not shown here, nor was it attempted to be shown, that the plaintiff was offered any opportunity to choose between the two kinds of contracts—whether he would have shipped his cotton at his own risk, at a lower rate, or at the company's risk, at a higher rate. He was told that the company had but one rate and but one kind of contract, which of course deprived the shipper of any option or choice of his own at all, and left him the alternative of either shipping his cotton under such conditions as the company chose to make or not shipping it at all.

It is the settled law that a carrier is not allowed to so limit its liability as to exempt it from the consequences of its own negligence or that of its servants.

N. Y. Central R. Co. *vs.* Lockwood, 17 Wall., 357–384.
The Tanbark, Federal Cases, No. 13742.

In New York Central R. Co. *vs.* Lockwood, 17 Wall., 357, it is declared that a contract of exemption is valid only where there is no negligence of the carrier. If this be the law, before the latter can have the benefit of the exemption it must show that the exemption falls within that class of cases in which its liability can be limited. This would require it to show affirmatively that it was guilty of no negligence as a prerequisite to the exemption having any effect whatever.

17 Wall., 357–384.

The burden of proof was on the defendant to show that the exemption was given in the case where it was permissible, and this could only be done by proof that the defendant itself was free from negligence, because, as to this, there could be no exemption stipulated at all.

Inman *vs.* South Carolina R'w'y, 129 U. S., 128–139.
Duvenick *vs.* Mo. P. R. R. Co., 57 Mo. App., 550–555.
Dillard *vs.* L. & N. R. R. Co., 2 Lea (Tenn.), 288.
Steele *vs.* Townsend, 37 Ala., 247.

In Louisiana the liability of a carrier for its own negligence is an exception to the instances in which it can stipulate for the exemption from liability. It therefore must show that the exemption stipulated has reference to a permissible case—that is, in which it had been guilty of no negligence.

Maxwell & Putnam *vs.* S. R. R'w'y Co., 4 La. Ann. Rep., 397.
Roberts *vs.* Riley, 15 La. Ann. Rep., 103.

This rule has been affirmed by some of the Federal courts.

N. J. Steam Navigation Co. *vs.* Merchants' Bank, 6 How., 383.
Seiler *vs.* Pacific Co., 21 Fed. Cases, No. 12644, p. 1042.
Ormsby *vs.* Union Pac. R. Co., 4 Fed. Rep., 706–712.

The loss must be the proximate cause of the fire.

Condict *vs.* Grand Trunk R. Co., 54 N. Y., 500–504–505.

Pierce *vs.* So. Pac. Co., 40 L. R. A., 350–354.

The fire in this case was not the proximate cause of the loss of the cotton; this latter was the negligence of the defendant in failing to take measures to guard or watch the cotton and precautions against the occurrence of the fire, and also in failing to provide sufficient means or assistance to save the cotton, or a portion of it, after the fire began.

Moreover, if there was a failure to take measures to prevent the fire in the first instance, this would be negligence of the company, against which the exemption would not apply; if there was a like failure to prevent the entire or partial destruction of the cotton by fire, after it started, this would be an intervening cause of damage, subsequent to the commencement of the fire, and, hence, would not be the proximate cause of the loss.

The delivery here to the defendant was complete, so far as to subject defendant to all of the liabilities of a common carrier.

St. Louis, etc., Co. *vs.* Murphy, 60 Ark., 333 (30 S. W., 419).

Dixon *vs.* Ga. Central R. Co., 110 Ga., 173 (35 S. E., 369).

I. C. R. Co. *vs.* Smiser, 38 Ill., 354.

Greenwood *vs.* Cooper, 10 La. Ann. Rep., 796.

Barrett *vs.* Salter, 10 Rob. (La.) Rep., 424.

Fitchburg, etc., Co. *vs.* Hanna, 6 Gray (Mass.), 539.

The burden of proof was on the defendant here to show that it was free from negligence in order that the exemption relied upon can be given effect.

South., etc., Co. *vs.* Henlin, 52 Ala., 606 (23 Am. Dec., 598).

Adams Express Co. *vs.* Stetaners, 68 Ill., 184 (14 Am. Dec., 457).

Texas, etc., Co. *vs.* Richmond, 94 Tex., 571 (63 S. W., 619).

It has been decided that a special contract exempting the carrier from liability in specified instances is to be made use of by the carrier for any alleged dereliction of duty, against which it is designed to afford protection.

So. Pac. R. Co. *vs.* Arnette, 111 Fed. Rep., 849–852.

In the present case, however, assuming that it was not the duty of the defendant to first prove itself free from negligence in order to show that the contract of exemption was operative as being made in an instance in which the law did not forbid it, the condition of the evidence unquestionably shows that the plaintiff was entitled to go to the jury at least on the question of defendant's negligence, which was established beyond a doubt; it appears that the cotton was loaded into box cars of the defendant, sent by it expressly to the switch in an open field, for the purpose of receiving the cotton for carriage; that at this point, where the cotton was laden, the defendant maintained no station and kept no agent, or other representative; that the cars containing the cotton were thus left unwatched, unguarded, and there is no claim of any care being taken by defendant to protect the cars and cotton from depredation, and that the cotton was left in this condition, uncared for, from five o'clock in the evening until about ten o'clock in the night, when it was discovered, with the cars, to be on fire; the cotton was in the possession of the company at the time, as is un-

questionably shown by its bill of lading, previously issued, and as would manifestly result from the fact of its being loaded under the circumstances.

In Louisiana, where the transaction occurred, it has been decided that a carrier, under conditions shown by the evidence here, was guilty of negligence; thus:

In Fischer *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), p. 120, it was held that where cotton was sent by plaintiffs to be shipped on board a vessel, received late in the evening, suffered to remain on the levee during the night of delivery and was consumed by fire, that the carrier was responsible for the value of the cotton; that although the cotton had been received late in the evening, defendant having received and receipted for it, its responsibility must be governed by the same rules as if it had been delivered early enough to put it on board the same day; *proof that it was customary to leave cotton exposed on the levee without any person to watch it* was not a good excuse for the carrier; such a custom could not control the law and would not be recognized by the courts of justice.

In Barrett *vs.* Salter, 10 Rob. Rep. (La.), 434, it was held that where a carrier receipts for goods left on the levee they are as much at his risk as if actually laden on board of the vessel, and that the latter would be responsible for any damage sustained by the goods while left in such condition; that from the moment the carrier receipted for the property in good order the ship became responsible for any damage subsequently discovered. (See page 437.)

The case of Fischer *vs.* Brig Norvall, 8 N. S. (Martin's La. Rep.), p. 120, was quoted approvingly by the supreme court of Louisiana in 1896, in the suit of Maxwell & Putnam *vs.* Railroad Co., 48 An. (La.), p. 399.

All that is declared by Fischer *vs.* Brig Norvall was reaffirmed in Darrell *vs.* Southern Pacific, 47 An. (La.), p. 1455.

In Roth *vs.* Harkson *et al.*, 18 Annual (La.), 705, cotton was delivered on the levee to be laden on board a vessel for

shipment; the vessel declined to receipt for the cotton on account of the late hour of the day; the cotton was lost and the ship was sued for it; it was held liable, and it was declared (page 706) that the cotton had been unloaded upon the wharf, covered with a tarpaulin, under the instructions of the mate, the captain, or the clerk; that in this condition the cotton was received by the carrier and in charge of the vessel; that the delivery was consummated and could not be recalled; that the ship had incurred the obligation imposed upon carriers and watermen; that the plaintiff had parted with his possession as custodian of the cotton by delivering the same to the brig; that it thereafter became a matter between the brig and the employer of plaintiff, the owner of the cotton.

And to the same effect is the law outside of the State of Louisiana.

The liability of a carrier commences whenever and as soon as the goods have been delivered to and accepted by him, solely for transportation, although they may not be put immediately *in itinere*, but are at first, for his own convenience and preparatory to the voyage or journey for which they are intended, temporarily deposited in his wharf or storeroom; in such cases the deposit is a mere accessory to the carriage, and does not postpone his liability as a common carrier to the time when they shall be actually put in motion towards their place of destination.

Hutchinson on Carriers, sec. 89, citing 6 Gray, 539.

If the delivery be made at the warehouse of the carrier for as early transportation as can be made in the course of the carrier's business, and subject only to such delays as may occur in awaiting the departure of trains, the railroad becomes, the moment the delivery is made, a carrier as to the goods, and its responsibility as such attaches at once.

Hutchinson on Carriers, sec. 89, citing Wade *vs.* Wheeler, 47 N. Y., 658.

Grand Tower Co. *vs.* Ullman, 89 Ill., 244.

If the parties agree that the goods may be deposited for transportation at any particular place, without express notice to the carrier, such deposit will be sufficient delivery; and proof of a constant and habitual practice of the carrier to receive goods when they are deposited for him in a particular place without special notice of such deposit is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between parties by which the goods, when so deposited, shall be considered as delivered to him without further notice; and delivery upon a private wharf or dock upon which it has been the carrier's custom and constant usage to receive goods left there for transportation is considered as a sufficient delivery, though the goods were not left in charge of any of its servants.

Hutchinson on Carriers, sec. 90.

The responsibility of the carrier is in complete existence from the time delivery is made.

Hutchinson on Carriers, sec. 94.

If the carrier negligently places or leaves goods in a place of danger, he cannot by a stipulation exempt himself from liability for loss by fire.

McFadden *vs.* Railroad Co., 92 Mo., 343.

It is quite evident that the defendant incurred the obligations of a carrier when the cotton was loaded upon its cars, with its consent, for the purpose of being transported to New Orleans. Surely its liability commenced at 4 o'clock in the evening, when it delivered to plaintiff's agent its bill of lading for the cotton. The duty to safeguard the cotton after it came into the possession of the defendant was as much a part of its duty as its conveyance and delivery. Whenever the situation or condition of the goods is such as to require special care or attention the carrier must do for them all that might be reasonably expected from a prudent

and careful person, or, if he chooses to do otherwise, it is at his risk, which he is considered as voluntarily assuming by his failure to exercise requisite care and caution. His duty being to safeguard the goods, he must to this end do all that is made necessary by their situation or condition, and, if he fails to do this, must be considered as assuming the risk of all the resulting perils. If the goods are exposed to danger of any kind he must afford protection against such danger, and if he has taken no steps towards furnishing protection he assumes the responsibility for all dangers that might have been avoided by proper care and diligence.

The circuit court was of the opinion that defendant was exonerated from all risk of leaving the cotton in its exposed condition, because the shipper had full knowledge of the situation in which it was left; that the plaintiff having voluntarily submitted his goods to a danger well known to him, he could not, under the circumstances, recover; it must be considered that the plaintiff also knew that the cotton was left where it was, not at his own risk, but at that of defendant, and, if the latter chose to take no measures for its protection, that it would be responsible to him for any loss or damage to the cotton which it had engaged to safely carry from Meeker's Switch, and to deliver it in good order to plaintiff in New Orleans; no case can be imagined where the shipper was without knowledge that the carriage of his property would be accompanied with some risk, yet, under the ruling of the circuit court, in any case where the shipper has such knowledge, he cannot recover from the carrier, no matter however gross the negligence of the latter might be; if the plaintiff had left the cotton where he did, at his own risk of any danger of fire, he would presumably have taken some steps to protect it, for instance, by having it guarded or watched; but knowing that as soon as the cotton passed into the possession of the defendant by being loaded on its cars at 2 o'clock in the evening, or by the issuance of its bill of lading at 4 o'clock,

it was no concern of his if by defendant's want of care the cotton was lost or destroyed. Surely the plaintiff was charged with no duty concerning the safeguarding of the cotton after it came into defendant's possession. If the company chose to leave the cotton unprotected, it may have considered this was unnecessary or more expensive than it would have been to have had it guarded. It assumed the risk by leaving the cotton unprotected; it had the right to do so if it so desired. The cotton itself was of no more value to plaintiff than the responsibility of defendant for its value, and such was its liability as soon as the cotton was received by it. Defendant's knowledge that the cotton was left exposed was accompanied with the further knowledge that if lost or destroyed in consequence of this condition that defendant would owe him its value. If his consent to leave the cotton where it was is to be inferred, this inference would fairly and logically include, as a condition or a consequence, that defendant would be liable for the cotton if it were lost by its failure to properly protect it; in other words, if lost by its negligence.

The judgment of the circuit court should be reversed.

Respectfully submitted.

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